

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 56th LEGISLATURE - REGULAR SESSION**

#### **COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By **CHAIRMAN BILL TASH**, on January 25, 1999 at 3:10 P.M., in Room 437 Capitol.

#### **ROLL CALL**

##### **Members Present:**

Rep. Bill Tash, Chairman (R)  
Rep. Hal Harper, Vice Chairman (D)  
Rep. Cindy Younkin, Vice Chairman (R)  
Rep. Rod Bitney (R)  
Rep. Aubyn A. Curtiss (R)  
Rep. Rick Dale (R)  
Rep. Bill Eggers (D)  
Rep. Ron Erickson (D)  
Rep. David Ewer (D)  
Rep. Gail Gutsche (D)  
Rep. Joan Hurdle (D)  
Rep. Dan McGee (R)  
Rep. Douglas Mood (R)  
Rep. Karl Ohs (R)  
Rep. Scott J. Orr (R)  
Rep. Bob Raney (D)  
Rep. Bob Story (R)  
Rep. Jay Stovall (R)  
Rep. Carley Tuss (D)  
Rep. Doug Wagner (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Deb Thompson, Committee Secretary  
Kathleen Williams, Legislative Branch

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

##### **Committee Business Summary:**

Hearing(s) & Date(s) Posted: House Bill 142, 1/20/1999;  
House Bill 298, 1/20/1999  
House Bill 300, 1/20/98  
Executive Action: None

**HEARING ON HOUSE BILL 142**

**Sponsor:** Rep. Sheill Anderson, HD 25, presented the bill. He explained the bill addressed grazing leases and their renewal. He referred to an amendment. **EXHIBIT(nah19a01)**

**Proponents:** Bud Clinch, Director DNRC, spoke in support of the bill. He said this bill deals with the School Trust Land management. The bill clarifies the law regarding special uses. Plaintiffs allege an EIS is inadequate. The problem is there is a never ending time period for new findings and allegations. He pointed out the department was a victim of procedure, surprised by new evidence. The courts have allowed late evidence of material facts. These issues are intended to be a board decision, however every administrative decision can be challenged in an issue raised after the fact. Every such challenge will intrude into agency decisions, making and substituting their judgement for that of the agency. **{Tape : 1; Side : A; Approx. Time Counter : 4.4 - 18.4}**

John Blomquist, Montana Stockgrowers Association, spoke in favor of the bill. He pointed out that MEPA was nebulous, where many terms of the act were undefined. Interpretations were easily litigated. He said it was a good idea for the Legislature to add guidance. He discussed an amendment. He talked about what would trigger a MEPA review, such as season of use, changes in crop, lease renewals and the hundreds of leases the department deals with. He suggested lease renewals not be subject to MEPA review providing there is no material change. He pointed out direction was needed since the MEPA statute was nebulous. **{Tape : 1; Side : A; Approx. Time Counter : 18.6 - 28.3}**

Cary Hegreberg, Montana Wood Products Association, pointed out the issue was "analysis paralysis". MEPA was originally conceived as a "look before you leap" statute. It was designed to direct decision makers at the state government level to analyze and consider environmental impacts of actions which they were about to embark upon. Unfortunately, MEPA, which was a well intentioned statute, has been abuse, over interpreted by the courts and is one of the primary factors strangling the economy in Montana. He read a letter from an employee from the Department of State Lands. That letter described concerns from that employee regarding five years of litigation with the Friends of the Wild Swan. He pointed out the loss of jobs by loggers and families. The original intent of the Montana environmental policy, MEPA, is now used by litigious groups. MEPA is hard to define and expensive in court. Revenue from forested trust lands are declining. He distributed a letter from Patrick Heffernan, Staff Forester representing the Montana Logging Association.

**EXHIBIT (nah19a02)** Heffernan pointed out MEPA was designed as a decision-making tool so that state agencies could make better decisions regarding management projects and their effects on the environment. He pointed out State Trust Lands are not public lands per-se, but lands designated to provide for the generation of revenue for their respective beneficiaries. MEPA has become the basis for many frivolous lawsuits designed to hinder lawful and sound state management actions.

Gail Abercrombie, representing the Montana Petroleum Association, spoke in support of the bill. She pointed out the bill would give clear direction so insignificant changes could be made to a lease without triggering a MEPA review.

Don Allen, Western Environmental Trade Association, spoke for the bill on behalf of the association members. He said the bill would be an improvement regarding the interpretation of MEPA.

**{Tape : 1; Side : A; Approx. Time Counter : 34.3}**

Jim Mockler, Montana Coal Council, spoke about how MEPA was used to stop projects. The bill would make material facts available up front.

Jill Andrews, Montana Mining Association, said the bill would allow for clarification. It is an important step to prevent delays in projects.

Bill Snoddy, representing Government Affairs in the McDonald Gold Project, discussed his views. He noted they were painfully aware of the inadequacies of MEPA.

**Opponents:** Ira Holt, Ravalli County Fish and Wildlife Association, said their association was one of the oldest clubs in the state. They had opposed the timber sale because of the wildlife concerns. They feel the bill is a retaliation for the suit they won. He discussed the effects of domesticated sheep on wild sheep. He described how no action was done at the Department of State Lands to address their concerns. There was no process for appeal and no review. The case went to the Supreme Court where they won. Now there are guidelines to protect the wild sheep. He pointed out appropriate actions are needed when conditions on the ground warrant it.

Tony Schoonen of Butte, representing the State Lands Coalition and Public Lands Access Association, spoke against the bill. They felt the bill would allow state agencies to create a closed government and avoid responsibilities. They believed the environmental policy act would allow an EA review prior to submitting lease bids, so problems such as diseased bison could be addressed. They pointed out the short time frame for bidding

on leases and the excessive time of 20 years. **EXHIBIT(nah19a03), EXHIBIT(nah19a04), EXHIBIT(nah19a05), EXHIBIT(nah19a06) {Tape : 1; Side : A; Approx. Time Counter : 43.8}**

Tamara Trogekiss, Cottonwood Resource Council, spoke as an opponent to the bill. She discussed the importance of planning growth relative to the Stillwater Platinum Palladium Mine. She explained she was the McCloud Ranch Manager. She worked at making sure the mine goes correctly. It seemed to her that the agencies were looking to shut out the public. She objected to allowing the agencies decide what was adequate evidence. She suggested requesting an EIS was a way to address inadequacies. MEPA provides citizens with a means to "watchdog" what regulatory agencies and industry are doing. Citizens must have the ability to introduce new concerns and new evidence in court. **{Tape : 1; Side : A; Approx. Time Counter : 46.5-51.9}**

Van Jamison, representing the Montana Wildlife Federation, opposed the bill. He said the bill was intended to clarify the Montana Environmental Policy Act. However, he objected to two of the provisions. The bill would allow a limitation to the scope of a review, which represented a fundamental shift in the responsibilities from the agency to the citizen. This provision would force average citizens to gather evidence regarding any environmental issues they raise and to present their evidence to the agency before the agency makes its decision. Currently, agencies properly are charged under MEPA with a fundamental belief, to make an independent assessment of the environmental consequences associated with the decisions that they make. They have been given this duty because they have professional staff who can conduct investigations, and ability to collect fees to require additional expertise to evaluate the issues. Citizens have meaningful input that should not be disregarded. He pointed out the department and the board exempt themselves from compliance with MEPA even when there are environmental consequences. Agencies have responsibility to protect the public. There should be a proper balance between a citizen's obligation to participate in the process and the agencies duty to investigate the information to properly evaluate their concerns.

Harley Harris, Assistant Attorney General, appearing on behalf of Attorney General Joe Mazurek, raised some concerns about the bill. **EXHIBIT(nah19a07)** He read a memorandum which discussed evidence being presented prior to an agency decision and the exemption for DNRC from MEPA for functions such as lease renewals and assignments.

**{Tape : 1; Side : B}**

Rusty Harper, representing the State Auditor's Office and Mark O'Keefe, said he supported the Attorney General's Office. He pointed out the disagreement that the Land Board had with the Board of Regents over this same issue. The Board of Regents should be under the same rules.

Janet Ellis, representing the Montana Audubon spoke against the bill. **EXHIBIT(nah19a08)** She pointed out the MEPA law allowed citizens to examine major actions of state government and the affects on the environment.

Anne Hedges, Montana Environmental Information Center, spoke against the bill. She pointed out the need to use MEPA based on inadequate EIS. The public should be able to participate in the process.

Tary Mocabee, representing Friends of the Wild Swan, spoke against the bill. **EXHIBIT(nah19a09)** She pointed out that truth was being revealed on projects all the time, but the bill would require that all the facts be present in the beginning. She presented excerpts of an analysis by Jack Tuholske.

**EXHIBIT(nah19a10)**

Joe Kirwin, Deputy Secretary of State, spoke as an opponent.  
**{Tape : 1; Side : B; Approx. Time Counter : 5.2}**

Art Noonan, representing the Sierra Club from Butte, opposed the bill.

Bill Holdorf, Butte Skylines Sportsman Club, opposed the bill.

Joe Lambs, representing Office of Public Instruction, opposed the bill.

Betty Waddell, Montana Association of Churches, spoke against the bill.

L.F. Thomas, representing the Anaconda Sportsman Club, was against the bill.

Jerry Wells, Montana Council of Trout Unlimited, was opposed to the bill.

Art Callan, Bitterroot Chapter of Mule Deer Foundation, opposed the bill. He distributed an article about diseased bison.

**EXHIBIT(nah19a11)**

Dale Cartwright, Anaconda Sportsmen Club, opposed the bill.

Ron Cunningham, representing the Montana River Action Network and Fishing Outfitters Association, spoke against the bill.

**Questions from Committee Members and Responses:** Rep. Raney asked Rep. Anderson about material changes regarding exemption from MEPA review and potential impacts. Rep. Anderson replied this addressed change in use. He said what is critical is that there is a lease in place that has parameters. This lease would still be wide open to where an EA or an EIS could be overridden all of the time during that lease, regardless of who owned it. The proper time for an EA or an EIS is at the start of that lease. After the contract is in place, it is prone to be re-opened and re-negotiated.

Rep. Raney said the opponents identified the issue of how could citizens know all the potential uses of state land, when the original lease was granted, so they could answer all of their concerns in the beginning when in the beginning they are only addressing the proposed use. How could they know that there would be a change in use that would affect them when there is no proposal for that use in the original application.

Rep. Anderson replied if you have a lease that is in place, if you want to do something that lease doesn't address that would be a change of use. That would trigger an opportunity for an EA or an EIS. Rep. Raney pointed out in the Sheep vs. Sheep case the change in use did create a significant impact that under the bill would not be addressed. Rep. Anderson replied that was a unique situation. The court in trying to address that situation has left the door wide open in allowing all of these leases to be held up.

Rep. Dale asked if the original lease triggered a review. Clinch replied that they may not have known unless the plaintiff brought it to them. Section two addresses the discretion of the department when a plaintiff brings in that issue the department has the discretion to analyze those facts and determine if it warrants that. He pointed out the department gets all sorts of requests that they believe to be arbitrary. He noted that section two was not exempting the department from MEPA but rather clarifying that for those activities where they have the authority to act but are not bound to, there will be some discretion. It is important to remember the part in section one where it lists all those other things, such as the issuance of new leases, sale and exchanges, that the department is bound to do MEPA on those because it is an initiation of a new project. He wanted to clarify that when there is really something happening on the landscape that the department has the authority to act. **{Tape : 1; Side : B; Approx. Time Counter : 9.8 - 13}**

Rep. Dale asked what other issues would be imposed on the department staff if they were bound to do an EA or an EIS. Clinch described Eastern Montana issues and the potential significant effects of multiple cases, relative to future concerns on the landscape. There were a number of issues on the horizon in some people's minds that there was potential significant effects. If those issues were raised, the department would be bound to that so the entire staff would be focused on analyzing those aspects and defending those in a court of law. Staff that are bound to do other things would be allocated to do MEPA compliance.

Rep. Ohs asked how many actions the department dealt with per year that could have potential issues. Clinch replied the department routinely transferred or renewed about 2,000 per year. These were all types of issues from oil and gas leases, grazing leases to agricultural leases. **{Tape : 1; Side : B; Approx. Time Counter : 16.5}**

Rep. Hurdle asked what kinds of things would the department and the board be exempt from. Clinch replied section one references all the things that would be clarified that the department would not be exempt from. An example would be an existing lease on the landscape, an agricultural tract to grow a crop. A lease would be typically in place for a ten year duration. When that lease was issued it came with a whole set of stipulations that allowed for various kinds of crops and identified reports or payments due, including environmental concerns. He pointed out in practicality those agricultural leases are changed and they are allowed to change by the provisions of that contract. He described changes that were allowed such as changing to another crop because of market conditions. This is the crux of the concern. His lease has already been authorized. If a plaintiff raises questions whether a project may have significant effect, an EIS must be done. Changes that occur within the lease that were allowed, now under this interpretation, when a lessee exercises the discretion of his lease and someone alleges an impact, the department is supposed to do an EIS. **{Tape : 1; Side : B; Approx. Time Counter : 17.5 - 21.4}**

Rep. Hurdle asked what this bill had to do with changes of crops. Clinch replied Title 75, Chapters 1 and 2 are MEPA. It talks about implementing provisions of Title 77. Title 77 are the titles that reference the management of school trust lands. These issues in the new section two don't pertain to any other agency. They are specific to the Department of Natural Resources and even more specific to the management of School Trust Lands.

Rep. Hurdle said she was concerned about using the department's discretion to prohibit citizens to introduce new information. Clinch replied it was important to understand that section addressed the challenge to the department's decision making in MEPA. The department is not proposing to be exempt from MEPA. As far as limiting information, if there never is a final time when the record is closed, it is impossible to ever come to a decision and present it to a judge for review if they always continue to accept new information that occurred after the process.

Rep. Story asked about the purpose of the retro-activity clause. Tommy Butler, Legal Counsel for the Trust Land, replied this retro clause applied to the ES and EIS that were currently being worked on. Rep. Story asked Clinch about the purpose of the Land Board in relation to the trust lands. Clinch replied the Land Board was created in the Constitution and they were granted specific authority to overview the management of the School Trust Lands and the production of revenue with specific requirements spelled out in statute.

Rep. Erickson asked if it was the department's contention that there could never be a new issue. Rep. Anderson replied the new issue was one presented at the district court level. Rep. Erickson pointed out that citizens should not be responsible for the gathering of data. He asked what the distinction was between issues and new evidence. Tommy Butler replied his experience spanned 15 years of litigating MEPA. He described what would happen in district court. An environmental litigant will ask to expand the administrative record. He will ask the judge to consider new evidence which the administrative agency has never seen and never been given a chance to respond to. He said "the game comes down to this - can an environmental litigant ask a question that has never been considered by the agency? Where the agency has never seen the evidence or issue that is a pretty easy game to play." He noted Rep. Erickson's question specifically was is the distinction between issue and evidence. Precisely what will happen in a MEPA case, an environmental litigant will say that the document is inadequate because it failed to consider a number of important environmental questions. They will present their evidence, usually in the form of expert testimony usually from a technical witness like a biologist. By the time these cases get to court, there have been extensive public comment period, scoping periods, draft documents, public participation, oral and written comment in response. There is fundamental agreement on the issues at that point. Issues are usually not the fundamental source of disagreement in a MEPA lawsuit. Instead, it is the question of evidence. The question before the committee today is how to level the playing field, how to respect the agencies authority to do this fact finding - to take



incredibly complex issues and grind them down and come to a common sense solution. Should this be left to district courts? The agency bill here says no. The Montana Supreme Court has had less and less respect for agency decision making. What they are doing is remanding these cases back to district court and letting the judges be the arbiters between two opposing experts. This bill would send that new evidence back to the agency for consideration. The district court would then look at the administrative record. Currently, there is civil litigation and the judges choose who is right. He suggested the agency staff had the training and expertise for these types of issues. These staff include hydrologists, geologists, wildlife biologists and others.

Rep. Erickson asked Mr. Jamison to discuss the amendment. Jamison replied this amendment would allow citizens to identify what they think the agency has not considered. This would allow the agency to factor information into their decision making process. He pointed out an issue could be raised at a public meeting that the staff did not get. The person who made the comment at the public meeting is denigrated, such as-they weren't very intelligent, they didn't know what they were talking about. This person had to overcome the fear of public speaking. He suggested going back to find out that person's issue. Most agencies act arrogantly and believe citizens can't participate effectively unless they have credentials. The person does not know they have been disenfranchised until afterwards. Then they have to hire somebody with the expertise to go head to head. That is the extra administrative record information that the courts allow in. The agencies are supposed to listen to the citizens, sort through the issues and then fairly investigate it.

Rep. Raney asked about leases that existed that had never had environmental review. Clinch replied some leases date back to 1889. Rep. Raney asked about these leases that rolled over to a new use. Clinch replied the statute addressed the renewal of the leases, 77-6-205, where the leases were renewed automatically. They do not come under the current MEPA because they are not discretionary actions of the department but administrative.

Rep. Raney asked about present activities covered by MEPA that would not be covered because of this bill. Clinch pointed out page 3, line 20-24, which listed normal activities done by the department as a state action. The only activity that may be exempted from MEPA was when a lessee proposed to do something that is already authorized to him, that somebody else would allege may affect the environment. The department would have the discretion to do an environmental review but would not be bound to on every one of those that is alleged to have an impact on the environment.

**{Tape : 2; Side : A}**

Rep. Curtiss asked if the department anticipated an increase in the budget and how many people in the department were engaged in this issue. Clinch replied there had been a substantial increase over the last decade and he would project more in the future. In just the last six years there had been a number of specialists on board, specifically to bolster expertise to prepare defensive legal documents. He said the possibility of increasing the budget was unlikely. The output changes accordingly. He noted the staff would focus on a more finite number of situations and the amount of actions they were able to defend and produce on the landscape will decrease.

**Closing by Sponsor:** Rep. Anderson closed. He described the Sheep versus Sheep case. He noted the case was goal oriented, and left the department with an EIS requirement when there are questions of use. Any change considered could go to the EIS. He pointed out this was a policy decision of how much is enough input in allowing new issues. Currently, the district court is the arbitrator of decisions that could be dealt with administratively. This bill would make parameters since the agencies are shackled from using common sense.

### **HEARING ON HOUSE BILL 298**

**Sponsor:** Rep. Dan Fuchs, HD 15, presented the bill. He explained a clarification of this issue was reviewed in the Administrative Code Commission meeting. He described the intent of the bill regarding the use of a cistern. He referred to the handout, which was an opinion from John MacMaster, concluding the department cannot mandate the requirement of a holding tank to be used in conjunction with an adequate well. **EXHIBIT(nah19a12)** The other handout is a copy of the law regarding controlled ground water areas. He explained the bill would not change anything in terms of the department being able to require a cistern inside a controlled ground water area, there being six in the state. This bill would allow the property owners to make a choice, remove unnecessary construction costs of putting a cistern in the ground if they have an adequate well that meets the state standards for quality and quantity. **EXHIBIT(nah19a13)** **{Tape : 2; Side : A; Approx. Time Counter : 10.2}**

**Proponents:** None

**Opponents:** Mark Simonich, Director of the Department of Environmental Quality, spoke against the bill. He explained they had reviewed the amendments to the sanitation and subdivision bill that were being proposed by this bill. They did not

understand the changes that were being proposed and how they applied to the current program. He described the current review process. **{Tape : 2; Side : A; Approx. Time Counter : 17.1}**

Joan Miles, representing Lewis and Clark County Health Department, spoke against the bill. She said they did not really understand the proposal and how to implement it in the field. She explained as a local health department they were under contract with the state Department of Environmental Quality to review subdivisions. She pointed out there was no guidance on hauling water from a reasonable distance. She said if a potable water source is available for hauling, look at the public policy implications. Can subdivisions be approved without a dependable and safe water supply? She said she had to certify that there was adequate evidence of a sufficient water supply, she should not have to tell a property buyer they had to haul the water in.

**Questions from Committee Members and Responses:** Rep. McGee asked the sponsor what the point of the bill was. Rep. Fuchs referred to the Administrative Code Commission meeting. The statute requires that an alternative water source be available. He explained the state has no authority to prevent you from drilling a well on your property, unless it is a controlled ground water area. If the well meets state standards, there is no reason to require a cistern as long as there is an alternative water supply available. The department can recommend a cistern, but that is where their responsibility should end. They have been requiring cisterns in the past. He read an excerpt from the Minutes from the Administrative Code Committee by Rep. Kottel.

**EXHIBIT (nah19a14)**

**Closing by Sponsor:** Rep. Fuchs closed. He said even after the Administrative Code Commission meeting, the department has continued to take a position that they don't understand this. If you have an adequate well, that meets their standards under their own rules, in terms of quantity and quality, why is there a requirement for a \$2,000 holding tank in the ground. Certainly, in the future an aquifer could be diminished. There is no sense to having a holding tank in the ground. People should make their own decisions and choices. The department does have a responsibility when they approve that subdivision to say on the plat, that they believe the aquifer may not be adequate or the well could be contaminated, then cisterns are recommended by the department. There is no liability beyond that.

**Sponsor:** Rep. Karl Ohs, HD 33, presented the bill. He explained the bill added the word "working". These are technical amendments. He said this clarifies the number of days local government has to review major and minor subdivisions. If the 60 days fell on a holiday or a Sunday, some of the local governments could be up for a lawsuit because they didn't finish the work in time. This change would slightly extend the days the local governments have to look at these. He pointed out there was a lot of growth in his county with very limited staff.

**Proponents:** Jane Jelinski, Montana Association of Counties, spoke in favor of the bill. She said there was unanimous support to pursue this legislation at the association's annual meeting. She said this was a benefit to rapid growing counties. She pointed out the frozen tax levies and limited revenues. **{Tape : 2; Side : A; Approx. Time Counter : 34.9}**

Howard Gipe, Flathead County Commissioner and chair of the MACO Subdivision Committee, spoke in favor of the bill. He pointed out the explosion of growth in Flathead County. He said this was a problem every day and they were rushed all the time.

Allen McCormick, Associate Planner with Lewis and Clark County and chair of the Legislative Committee for the Montana Association of Planners, described the subdivision process. He said a small amount of additional time is fair. **{Tape : 2; Side : A; Approx. Time Counter : 37.9}**

Anne Hedges, Montana Environmental Information Center, spoke in favor of the bill. She said this would allow for more thoughtful decision making.

**Opponents:** Dick Ainsworth, Land Use Planner in Missoula and Montana Association of Registered Land Surveyors, spoke against the bill. **EXHIBIT(nah19a15), EXHIBIT(nah19a16)** He pointed out the real problem with the time frames for subdivision review in the present law is not that they are too short, but that they were ignored by the majority of local governments. He asked if no one intended to live by the time frames why put them in the law at all. He described the creative ways the time constraints had been lengthened without ever going to the legislature, see Exhibit 15.

**Questions from Committee Members and Responses:** Rep. Erickson asked Mr. McCormick to describe the time frames. McCormick listed the various time frames that were needed to accomplish the process. He said the reason you see time frames starting at different points is because there is not enough time to handle the review. **{Tape : 2; Side : A; Approx. Time Counter : 53.9}**

Rep. McGee asked about the suggestion by Mr. Ainsworth that said 60 working days and if the work is not done and has not been granted an extension then it would be deemed approved.

Rep. Dale asked about rural counties where the applicants had a close relationship to those administering the subdivision law. There is generally an understanding of what is required. He asked if the process had been misused. Rep. Ohs responded that in his county with a limited staff and a great deal of subdivision activity that they were hard pressed to keep up.

Rep. Dale asked McCormick if there were situations where incomplete applications were put off. McCormick replied he hoped applications were considered on their merits and someone at the county would not abuse their power.

Rep. Dale asked Mr. Ainsworth about the misuse of authority for the extension of time. Ainsworth replied he could see that in Missoula County. He said there was nothing in the subdivision and platting act that talked about the requirement to review a packet as complete. The process of reviewing for completeness isn't in the law, the counties have added that.

***{Tape : 2; Side : B}***

Rep. Dale asked Ms. Jelinski to address consistency. Jelinski replied MACO was trying to provide more technical support. She noted most counties have clearly written policies of procedures and a checklist for a subdivision. She described circumstances where asking for an extension was appropriate and necessary.

**Closing by Sponsor:** Rep. Ohs closed. He pointed out the bill added a word in two places-"working".

**ADJOURNMENT**

Adjournment: 6:18 P.M.

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REP. BILL TASH, Chairman

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DEB THOMPSON, Secretary

BT/DT

**EXHIBIT (nah19aad)**